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No. 85-690

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, PETITIONER

v.

SAMMIE FELDER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether respondent's confession was properly suppressed, on the ground that it was obtained in an interrogation initiated by police, without notice to respondent's counsel, after formal charges had been filed against respondent, after respondent had requested counsel and counsel had been appointed to represent him, after counsel had explicitly instructed police that respondent was not to be questioned in counsel's absence, and without any affirmative indication from respondent that he wished to disavow reliance on counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-10) is reported at 765 F.2d 1245. The opinion of the district court (Pet. App. C-1 to C-15) is not reported. An earlier opinion of the court of appeals is reported at 693 F.2d 549.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1985. A petition for rehearing was denied on August 23, 1985 (Pet. App. A-1). The petition for a writ of certiorari was filed as of October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the U.S. Constitution are reprinted at page 2 of the petition.

STATEMENT

Course of Proceedings

Following a jury trial in the 176th Judicial District Court, Harris County, Texas, respondent was convicted of capital murder, in violation of Article 19.03(a)(2) of the Texas Penal Code. He was sentenced to death by intravenous injection. The Texas Court of Criminal Appeals affirmed (564 S.W.2d 776), and this Court denied certiorari (440 U.S. 950).

After the Texas courts had denied without a hearing respondent's request for collateral relief, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas (R. 1).[1/] That court granted a stay of execution (R. 92). Subsequently, during preparation for an evidentiary hearing scheduled by the district court, respondent filed an amended habeas petition, raising issues that had not been presented in respondent's application for collateral relief in the Texas state courts (R. 244). Accordingly, respondent moved to dismiss the petition without prejudice, to enable himself to return to the Texas state courts and exhaust his state collateral remedies (R. 288). The district court granted the motion (R. 302-303, 348-349), but the court of appeals

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1/ "R." refers to the record on appeal in the court below.

reversed, holding that state law enforcement authorities were entitled to waive the exhaustion requirement. The court of appeals remanded to the district court, with instructions to reach the merits of respondent's claims (693 F.2d 549).

Without affording respondent a hearing of any kind, the district court denied the amended petition for a writ of habeas corpus (Pet. App. C-1 to C-15). A unanimous panel of the court of appeals reversed, on the ground that respondent's confession was obtained in violation of respondent's Sixth Amendment right to the assistance of counsel and therefore should not have been admitted into evidence against him at trial (Pet. App. B-1 to B-10).

Factual Background

On March 14, 1975, James Hanks, a quadriplegic, was killed in the course of a burglary in Houston, Texas. Houston law enforcement officers filed a felony complaint on April 11, 1975, charging respondent with capital murder (Pet. 4; Pet. App. B-1 to B-2). On the same day, the Texas court issued a fugitive warrant for respondent's arrest (id. at B-2). On April 14, respondent was stopped for a minor traffic offense in Idaho Falls, Idaho. He was arrested when he failed to produce a driver's license and gave a false name (ibid.). Subsequently, the Idaho police discovered the Texas warrant and held respondent on it pending extradition proceedings. On April 15, respondent was arraigned as a fugitive before a local court in Bonneville County, Idaho.

He requested a lawyer (Tr. 3299; Exh. 38, at 1284, 1285),[2] and later the same day the Idaho court appointed R. John Insinger, Esq., a member of the local bar, to represent him (Pet. App. B-2; Exh. 38, at 1291, 1292).[3]

2/ "Tr." refers to the eight-volume, consecutively paginated state court record (including, inter alia, the trial transcript and the transcript of the pretrial suppression hearing), which was attached as an exhibit to the record in the court of appeals. Trial Exhibit 38 appears at Tr. 3518. It consists of 15 pages of records from the proceedings in the Idaho court, which were admitted into evidence as a single exhibit at respondent's trial. These pages are not separately numbered as part of the state court record. They are, however, separately numbered, from 1281 through 1295, as part of another numbering scheme.

3/ Petitioner's summary of the record contains certain inaccuracies. Although these mistakes are not of great importance, and although petitioner himself acknowledges that Mr. Insinger represented respondent in connection with his extradition to Texas on the charge of capital murder, we wish to reject any suggestion or implication by petitioner that Mr. Insinger's representation was limited or primarily related to respondent's status as a fugitive from Colorado, where he was apparently wanted on auto theft charges. To the extent that they can be ascertained from the record, the facts are as follows:

When respondent was arrested he was driving a car bearing Colorado license plates (Tr. 3251-3252, 3297). On the day after respondent's arrest, April 15, 1975, the arresting officer appeared with respondent before Judge Adams in the Idaho local court. The officer apparently testified that respondent was wanted in Colorado on charges of auto theft, and the Idaho court issued a warrant authorizing respondent to be held in Idaho on the charge of being a fugitive from justice (Tr. 3289-3290; Exh. 38, at 1282). Later the same day, respondent appeared before Judge Black in the local Idaho court. The court advised respondent of the "fugitive from justice" charges against him, and respondent requested the appointment of an attorney (Tr. 3299; Exh. 38, at 1284, 1285).

The time of respondent's appearances before Judge Adams and Judge Black on April 15 is not clear from the

(Continued)

Mr. Insinger consulted with respondent daily, or almost daily, while respondent was held in Idaho Falls (Pet. App. B-2; R. 71). Mr. Insinger also carefully and explicitly instructed the Idaho police not to question respondent regarding any of respondent's legal affairs outside counsel's presence (Pet. App. B-2). Initially, the officers complied with this instruction; when they wished to question respondent about a reported murder in Denver, unrelated to the

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(Continued)

record. It is therefore not clear whether the Idaho police knew at the time of these appearances that respondent had been charged with capital murder in Texas. The record does show that a telegram from the Houston police to the Idaho police, informing the Idaho police of the murder charge and asking them to hold respondent for the Texas authorities, was received in Idaho shortly before 1:00 p.m. on April 15 (Exh. 38, at 1283). The record further shows that shortly after 4:00 p.m. on April 15, respondent appeared before Judge McClure in the Idaho local court for an indigency hearing. It was at this hearing that Mr. Insinger was appointed as respondent's counsel (Exh. 38, at 1290, 1291, 1292). At the time of Mr. Insinger's appointment, therefore, respondent had already been charged as a fugitive from justice in Idaho, and the Idaho authorities knew of the capital murder charge pending against respondent in Texas. Mr. Insinger himself understood that his appointment to represent respondent on the "fugitive from justice" charges involved the pending Texas murder charge (R. 70-71; Tr. 84-85, 93).

Represented by Mr. Insinger, respondent appeared again before Judge McClure on April 16, 1975. During this appearance, respondent waived extradition to Texas, not Colorado. Petitioner's statement to the contrary (Pet. 5) is inaccurate. The Idaho court's log of the April 16 appearance explicitly notes that defense counsel made remarks concerning extradition to Texas (Exh. 38, at 1293). In addition, Mr. Insinger's April 28, 1975 affidavit requesting the payment of attorney's fees states that he appeared with respondent in court only once (Exh. 38, at 1294-1295). Likewise, Mr. Insinger's December 15, 1975 deposition on written questions, which was filed in the Texas trial court, states that he appeared with respondent in court only once (Tr. 84, 92-93). The record contains no indication that respondent ever waived extradition to Colorado.

Texas offense, the officers notified Mr. Insinger of their desire to conduct the interrogation, and they conducted it in his presence (ibid.).

Members of the Houston police department also knew that respondent was represented by Mr. Insinger: they spoke to Mr. Insinger by telephone in an effort to secure respondent's cooperation in the extradition proceedings (Pet. App. B-2).

Nevertheless, on April 23, 1975, a Houston police officer, J. W. Clampitte, who by his own admission knew that counsel had been appointed for respondent, interrogated respondent about the Texas capital murder charge in the absence of Mr. Insinger. In the words of the court below, "[t]he interview was initiated by Clampitte without notice to Insinger, who did not consent to it and was not present" (Pet. App. B-2). Indeed, Mr. Insinger was not even aware that any representative of the Houston police had arrived in Idaho Falls (R. 73). It is undisputed that respondent did not initiate the interrogation. During the questioning, Officer Clampitte extracted respondent's oral and written confession. Officer Clampitte then accompanied respondent back to Texas.

At a pre-trial hearing on the admissibility of respondent's confession, Officer Clampitte testified (Tr. 236) that he read respondent his Miranda warnings and then, without further ado, commenced the interrogation:

> Well, when I went in there, I introduced myself, told him where I was from, read his legal warning from our blue card, and then we sat down and started talking.

The officer did not advise respondent that formal charges had already been filed against him in Texas. The officer took no

steps to ensure that respondent appreciated the dangers of proceeding without the advice of counsel. In fact, there is every reason to believe that respondent did not appreciate those dangers. According to a report prepared in October 1975 by a state psychologist, respondent is a dull-witted man with no more than a sixth grade education and an I.Q. of 88. Moreover, he was quoted in the psychologist's report as saying that he had difficulty understanding the strategy and implications of what his Texas trial counsel said to him (Tr. 74-77; see also Pet. App. B-6).

Shortly before trial, the Texas court ruled that respondent's confession was admissible (Tr. 148-150). The court found that (i) Officer Clampitte advised respondent of his Miranda rights before commencing the interrogation and (ii) respondent knew that his statement could be used against him and that he could have a lawyer appointed if he was indigent. The court concluded that the confession was made voluntarily, after a valid waiver of respondent's Miranda rights.

In denying respondent's federal habeas petition, the district court focused on the question whether respondent's confession was voluntary, implicitly (but erroneously) equating that inquiry with the question whether respondent made an informed and intelligent waiver of his constitutional right to counsel (Pet. App. C-4 to C-6). The district court applied the voluntariness standard set forth in Schneckloth v. Bustamonte, 412 U.S. 18 (1973), and Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001, 1014 (1981), and concluded that

"[respondent's] claim of an involuntary confession must be denied" (Pet. App. C-6).

The court of appeals reversed, relying on this Court's decisions in Brewer v. Williams, 430 U.S. 387 (1977), and Massiah v. United States, 377 U.S. 201 (1964). The court observed that at the time Officer Clampitte began his interrogation of respondent,

(i) formal judicial proceedings against respondent had commenced, and respondent's Sixth Amendment right to counsel had attached (Pet. App. B-4);

(ii) a lawyer had been appointed to represent respondent, and Officer Clampitte knew it (ibid.);

(iii) Mr. Insinger represented respondent "as to all criminal matters facing the accused while he was present in Idaho, and the attorney was treated accordingly by both the Houston and Idaho police" (ibid.);

(iv) Mr. Insinger had forbidden interviews with his client outside the presence of counsel (id. at B-2, B-6); and

(v) Office Clampitte had made no effort to contact respondent's counsel but instead had merely read respondent his Miranda warnings and asked whether respondent had conferred with a lawyer (id. at B-2, B-4, B-6).

Based on its review of the totality of circumstances surrounding respondent's confession, the court of appeals concluded that the State had not established a valid waiver of respondent's Sixth Amendment right to the assistance of counsel (id. at B-6 to B-8). Accordingly, the court held that respondent's confession should not have been admitted into evidence against him.

Because the court of appeals granted relief on Sixth Amendment grounds, it did not reach either the question whether respondent's confession was obtained in violation of his Fifth Amendment rights or any of the other issues raised in respondent's habeas petition.

ARGUMENT

The court of appeals correctly applied this Court's decisions in Brewer v. Williams, 430 U.S. 387 (1977), and Massiah v. United States, 377 U.S. 201 (1964), to the facts of this case. Contrary to petitioner's assertion, the court of appeals decision adopts no novel rule of law. Indeed, the court of appeals deliberately avoided endorsing any per se rule of the kind that petitioner condemns. Instead, the court simply considered the totality of circumstances surrounding respondent's confession, observed that the facts here are nearly identical to those considered by this Court in Brewer, and held, as this Court did in Brewer, that the State failed to establish a valid waiver of respondent's Sixth Amendment right to counsel. Review by this Court of the court of appeals' fact-bound ruling is not warranted.

A. The Court of Appeals Correctly Applied This Court's Precedents and Did Not Adopt Any New Per Se Rule of the Kind Challenged By Petitioner

Although respondent vigorously argued that Officer Clampitte's mere attempt to solicit a waiver of respondent's right to counsel violated respondent's rights under both the Fifth and Sixth Amendments (Br. 9-17; Reply Br. 1-4), the court of appeals did not decide the case on that ground. The court simply noted the overwhelming number of similarities

between this case and Brewer and then used this Court's approach in that case to decide the waiver question here. If the court of appeals had adopted a per se rule, as petitioner contends, the court's extended discussion of the waiver issue would have been unnecessary.

Here, as in Brewer, it is undisputed that the accused's Sixth Amendment right to counsel had attached and that the accused was represented by counsel at the time of the disputed interrogation. Here, as in Brewer, counsel for the accused had given strict instructions to police that his client was not to be questioned in his absence. Here, as in Brewer, the accused was given Miranda warnings on several occasions before the uncounselled interrogation began. Here, as in Brewer, the interrogator appealed to the accused's conscience in an effort to elicit a confession. Here, as in Brewer, the interrogating officer did nothing to explain to the accused the gravity of his situation or the dangers of proceeding without counsel.

This Court held in Brewer that to establish a waiver of the Sixth Amendment right to counsel the State must "prove 'an intentional relinquishment or abandonment of a known right or privilege.'" 430 U.S. at 404, quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Court stressed that "waiver requires not merely comprehension but relinquishment," and that "courts [should] indulge in every reasonable presumption against waiver * * *." 430 U.S. at 404. The Court also stated that the Sixth Amendment right to counsel "does not depend upon a request by the defendant * * *." Ibid., citing Carnley v. Cochran, 369 U.S. 506, 513 (1962).

Applying these principles to the facts in Brewer, this Court concluded that the State had failed to demonstrate a valid waiver. The Court acknowledged that the accused had been read his Miranda warnings on several occasions prior to his interrogation, including once just before the start of the automobile trip during which the interrogation occurred. Nevertheless, the Court held that the mere fact that the accused responded to the interrogating officer's remarks was not adequate to show waiver. The Court noted (430 U.S. at 404-405) that the accused had sought out and consulted with counsel on several occasions, had acted in reliance on counsel's advice, had been advised by counsel not to make any statements to police in counsel's absence, was aware of counsel's instructions that police not question him in counsel's absence, and did nothing to disavow his representation by and reliance on counsel. On this basis, the Court held that the State had not shown "an intentional relinquishment" of the right to counsel.

The court of appeals in this case faithfully followed this Court's approach in Brewer. The court emphasized that respondent "did not initiate the interview with [Officer] Clampitte, * * * did not disavow his lawyer, and did not express any desire to talk either with police officers generally or with Clampitte personally in the absence of his attorney" (Pet. App. B-7). In addition, the court said, respondent "gave no other affirmative indication of a desire to relinquish his previously-asserted right to the presence of counsel" (id. at B-7 to B-8). Having considered all the relevant facts surrounding respondent's confession, the court of appeals correctly concluded that the facts of this case

"are indistinguishable from those in Brewer" (id. at B-8). The court therefore held that the State failed to bear its burden of proving that respondent disavowed his reliance on counsel and intentionally relinquished his Sixth Amendment right.

Both points on which the State now seeks certiorari are simply not raised by the decision below.

First, the court of appeals adopted no per se rule, even though respondent urged the court to do so. If the court had adopted such a rule, it would have looked no further than Mr. Insinger's express assertion of respondent's rights and Officer Clampitte's admission that he, not respondent, initiated the interrogation. But that is not what the court of appeals did. The court did not hold that respondent's rights were violated at the moment when Officer Clampitte began speaking with him, and it did not hold that it would have been impossible for Officer Clampitte to obtain a clear and unequivocal waiver in the absence of respondent's lawyer. The court held only that Officer Clampitte failed to obtain such a waiver on the facts of this case. Like this Court in Brewer, the court of appeals ruled that the mere reading of Miranda warnings prior to respondent's interrogation was not a sufficient basis on which to find a waiver of the Sixth Amendment right.

Second, in determining whether the State had proved waiver, the court of appeals did not depart in any way from the legal standard set forth by this Court in Johnson v. Zerbst, 304 U.S. 458 (1938), and it did not deny the relevance to the waiver inquiry of respondent's signed written confession, which contained a "waiver of rights" form. On

the contrary, the court of appeals expressly took account of respondent's written confession in deciding the waiver question. The court noted the historical fact that respondent did not sign the written statement containing the "waiver of rights" form until after he had already submitted to interrogation by Officer Clampitte. The court held that, just as respondent's oral answers to Officer Clampitte's questions were not adequate to establish "an intentional relinquishment" of the right to counsel, so respondent's subsequent signing of the written confession prepared by Officer Clampitte was not adequate to show such a relinquishment. A simple reading of the court of appeals' opinion demonstrates that the court did not disregard the form signed by respondent and did not assert that it had no bearing on the issue of waiver. The factual predicate for petitioner's second argument is therefore missing.

In the end, petitioner's complaint comes down to nothing more than an assertion that the court of appeals incorrectly applied the standards of Brewer, Massiah, and Johnson to the facts of this case. Review by this Court of the application of settled legal standards to the facts of a particular case is ordinarily not warranted. And that general rule is particularly applicable where, as here, this Court has already applied the very same standards to facts nearly identical to those involved in the decision for which review is sought.

B. Respondent's Fifth and Sixth Amendment Rights Were Violated When Officer Clampitte Initiated the Interview After Respondent Had Requested Counsel and After Appointed Counsel Had Instructed Police Not to Question Respondent In Counsel's Absence

Respondent strongly urged the court of appeals not even to reach the waiver question but instead to hold simply that, in light of counsel's explicit instructions that respondent should not be questioned in counsel's absence, respondent's Fifth and Sixth Amendment rights were violated as soon as Officer Clampitte began speaking with respondent for the purpose of obtaining information about the pending Texas charges. As we have seen, the court of appeals did not accept respondent's invitation to approach the case in this way. Rather, the court assumed for the sake of argument that Officer Clampitte could have obtained a valid waiver and addressed the question whether he in fact did so. Although the court thus adopted respondent's second argument in support of suppression rather than his first, the court's judgment can nevertheless be defended on the theory not addressed by the court of appeals. The judgment below is correct, and this Court should deny certiorari, because Officer Clampitte should not have been questioning respondent at all, once respondent's counsel had instructed police that respondent was not to be questioned in counsel's absence.

1. The Sixth Amendment

For Sixth Amendment purposes, the critical point is that, once the State has begun formal criminal proceedings, the accused should be entitled to depend on counsel to serve as the intermediary between him and the State in connection

with those proceedings. Once the Sixth Amendment right has attached, and once the accused, either by himself or through his attorney, has asserted his right to deal with the State only in the presence and with the assistance of counsel, the State must respect that choice, and law enforcement officers should not be permitted to solicit a waiver of the accused's right to counsel through one or more attempts at interrogation. The accused should not be forced, if he wishes to preserve his rights, repeatedly to reassert them, whenever the police choose to confront him.

As this Court said earlier this month, "[t]he Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. * * * [T]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." Maine v. Moulton, No. 84-786 (Dec. 10, 1985), slip. op. at 15. The State may neither knowingly exploit nor intentionally create an opportunity to confront the accused without counsel being present. Ibid. at 16. See also Estelle v. Smith, 451 U.S. 454, 469-471 (1981) (finding Sixth Amendment violation where state introduced evidence obtained in psychiatric examination of the accused that was conducted without advance notice to defense counsel).

Officer Clampitte's initiation of the interview with respondent was nothing less than an effort to circumvent respondent's right to counsel. By his own admission (Tr. 3211), Officer Clampitte hoped to obtain from respondent a statement that, in the officer's view, respondent would

have been considerably less likely to provide if counsel were present. The Sixth Amendment is intended to prohibit precisely this kind of effort by the State to exploit the absence of counsel.

We stress that, notwithstanding petitioner's assertions to the contrary, this case is very different from Michigan v. Jackson, 421 Mich. 39, 365 N.W.2d 56 (1984), cert. granted, Nos. 84-1531 and 84-1539 (May 28, 1985), and State v. Wyer, 320 S.E.2d 92 (W.Va. 1984), on which petitioner relies. Those cases, and others like them, raise the question of the significance, under the Fifth and Sixth Amendments, of an accused's request at arraignment that counsel be appointed. The primary issue is whether the making of such a request precludes law enforcement officers from soliciting a waiver of a defendant's Sixth Amendment right in the absence of counsel.

Even if that question were to be answered in the negative, it would not control this case. Here, respondent had not merely requested counsel at arraignment, but counsel had been appointed for respondent, respondent had consulted repeatedly with counsel, counsel had advised respondent not to make any statements to the police in counsel's absence, respondent had acted in reliance on counsel's advice, and counsel had expressly instructed the police, on behalf of his client, that respondent was not to be questioned unless his lawyer was present. In these circumstances, it was impermissible for Officer Clampitte to attempt to interrogate respondent, and that would be so regardless of the outcome in Michigan v. Jackson.

The Sixth Amendment rule described here finds further support by analogy to decisions under the Fifth Amendment. This Court has already held, in the context of the Fifth Amendment, that when a person in custody requests counsel during police interrogation, that request must be honored, and interrogation must cease and not resume until counsel has been provided. Edwards v. Arizona, 451 U.S. 477 (1981). The obligation of law enforcement officers to respect an accused's assertion of his Sixth Amendment right to counsel should certainly be no less than their obligation to respect a suspect's request for the assistance of counsel during custodial interrogation.

2. The Fifth Amendment

As respondent has argued throughout this case, his Fifth Amendment rights, as well as his Sixth Amendment rights, were violated by the initiation of questioning by Officer Clampitte. Respondent was in custody in Idaho at the time Officer Clampitte questioned him. The interrogation took place in a small storage room in the Idaho Falls jail. Through his counsel, respondent had expressly requested that he not be subjected to custodial interrogation in counsel's absence. By initiating the interview of respondent outside the presence of counsel, Officer Clampitte thus directly violated the rule set forth by this Court in Edwards v. Arizona, supra, and derived from the Fifth Amendment privilege against compulsory self-incrimination.4/

4/ Although this Court has held that Edwards should not be applied retroactively in federal habeas cases (Solem v.

(Continued)

Petitioner is simply wrong in suggesting (Pet. 10-11) that only a criminal defendant himself, not his lawyer, may assert the defendant's rights. A lawyer's very function is to assert and defend the rights of his client. Our entire legal system operates on the premise that a lawyer can speak and act on his client's behalf. This Court in Brewer v. Williams, supra, 430 U.S. at 405, proceeded on the assumption that the lawyer for an accused may assert the accused's right not to be questioned in the absence of counsel. The idea that law enforcement officers should be free to disregard the explicit efforts of counsel to protect the rights of his client is antithetical to the constitutional guarantee of the assistance of a lawyer. Moreover, as a practical matter, acceptance of petitioner's suggestion would merely lead defense counsel to insist that their clients themselves state to police, in the presence of counsel, that they do not wish to be questioned in counsel's absence. Encouragement of such a ritual cannot possibly enhance the efficiency of the criminal justice system.

The only authority cited by petitioner in support of his position is inapposite. Couch v. United States, 409 U.S. 322 (1973), had nothing to do with a lawyer's assertion of the rights of his client. Rather, the case concerned a

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Stumes, 465 U.S. 638 (1984)), that holding does not preclude respondent's Fifth Amendment argument. The rule in Edwards was already the rule in the Fifth Circuit twelve years before Edwards was decided. United States v. Priest, 409 F.2d 491 (5th Cir. 1969). This Court recognized as much in Edwards itself. 451 U.S. at 486 n.9 (citing Priest).

taxpayer's effort to "invoke her Fifth Amendment privilege against compulsory self-incrimination to prevent the production of her business and tax records in the possession of her accountant." Id. at 323. The point of the Court's decision was that the summons directed to the taxpayer's accountant involved no compulsion or coercion directed against the taxpayer herself and therefore did not present any occasion for an assertion of the taxpayer's Fifth Amendment privilege. It was in this context that the Court stated that "the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him." Id. at 328. The decision in Couch thus has no bearing on the efficacy of Mr. Insinger's instructions on behalf of his client.

* * * * *

For all the foregoing reasons, respondent's confession was obtained in violation of his Fifth and Sixth Amendment rights, and the court of appeals correctly decided that the confession should not have been admitted into evidence against him. Further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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